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PETITION FOR CERTIORARI

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1112

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SUPREME COURT, U.S.

FRANCO WAYNE KING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, FRANZO WAYNE KING, hereby petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit which decision affirmed the denial by the District Court, of petitioner's motion for an order permitting the petitioner to withdraw

his plea of guilty, and setting aside the judgment and sentence theretofore entered against him.

OPINIONS BELOW

The Per Curiam opinion of the United States Court of Appeals for the Ninth Circuit is reproduced and appended hereto as Appendix "A". This opinion adopts the reasoning of the District Court, which District Court opinion is reported at 307 F. Supp 217 (1970) and appended hereto as Appendix "B".

JURISDICTION

The order sought to be reviewed was made and entered on September 25, 1970. Timely petition for rehearing was denied November 16, 1970.

The statutory provision believed to confer on this court jurisdiction to review the judgment in question is 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether it violates petitioner's right against self incrimination preserved by the Fifth Amendment to the United States Constitution to fail to allow petitioner to withdraw his guilty plea and set aside judgment of conviction for failure to register under Marijuana Tax Act, 26 U.S.C., Sec. 4755(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, United States Constitution:

> "...nor shall be compelled in any criminal case to be a witness against himself..."

STATUTES INVOLVED

26 U.S.C. sec. 4755(a):

> "It shall be unlawful for any person required to register and pay the special tax...to import, manufacture, produce, compound, sell, deal in, dispense, distribute, prescribe, administer, or give away marijuana without having so registered and paid such tax."

STATEMENT OF THE CASE

A four count indictment was filed June 8, 1966, by the U. S. Grand Jury, Southern Division of California, charging petitioner, FRANZO WAYNE KING and two others with: Smuggling and concealing marijuana, U.S.C., Title 21, Sec. 176(a) (in two counts); illegal importation of marijuana without payment of tax, U.S.C., Title 26, Sec. 4755(a)(1); and smuggling merchandise, U.S.C., Title 18, Sec. 545.

Petitioner, FRANZO WAYNE KING, plead guilty to the charge of illegal importation of marijuana without payment of tax, U.S.C., Title 26, Sec. 4755(a)(1) and was granted probation. The other three counts were dismissed.

On November 12, 1969, a motion was filed in the United States District Court for the Southern District of California, Southern Division, to set aside the judgment and to permit petitioner, FRANZO WAYNE KING, to withdraw his plea of guilty; after a hearing on November 19, 1969, the motion was denied. The opinion denying the motion was reported, United States of America vs. Franzo Wayne King (1969) 307 F. Supp. 217. (See Appendix "B" for opinion.) On June 4, 1970, appellant, FRANZO WAYNE KING, appealed that decision to the United States Ninth Circuit Court of Appeals, docket number 25,579. On September 25, 1970, the Ninth Circuit Court of Appeals filed its Per Curiam decision (Appendix "A") affirming denial of appellant's motion. Petition for rehearing was denied November 16, 1970.

Appellant hereby petitions the United States Supreme Court for a Writ of Certiorari to review the lower court's decisions.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The subject decision below of the United States Court of Appeals for the Ninth Circuit is in direct conflict with the decision of the United States Court of Appeals for the Second Circuit in the case of United States of America vs. Stanley Garelle (1970), Docket number 189,190, decided October 13, 1970. (This decision does not yet appear in the Advance Sheets, however, a copy of the decision is appended as

Appendix "C".)

The Court in United States v. Garelle, supra., held that a conviction based upon a plea of guilty to 26 U.S.C. Sec. 4755(a) was unconstitutional as violative of one's right against self incrimination preserved by the United States Constitution, Amendment V. The Court in Garelle, supra., held that the self incrimination rationale of Leary v. United States (1969) 395 U.S.6 provided a bar to imposition of sanctions for violation of 26 U.S.C. Sec. 4755(a) (marijuana - unlawful acts in case of failure to register and pay special tax.)

Petitioner clearly comes within the scope of the rationale of Leary, supra. and within the very letter of U. S. vs. Garelle, supra.

CONCLUSION

This court should grant certiorari, and the orders below vacated and the conviction set aside.

Respectfully submitted

DeCRISTOFORO & SULLIVAN

By: Daniel J. Sullivan

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I am a citizen of the United States and a resident of the county aforesaid I am over the age of eighteen years and not a party to the within action; my business address is 901 F Street, Suite 240, Sacramento, California.

On the date set forth below, I served the within copy of PETITION FOR WRIT OF CERTIORARI on all the parties required to be served herein by serving the Respondent in said action, by placing three true copies thereof enclosed in a sealed envelope with Air Mail postage thereon fully prepaid, in the United States post office at Sacramento, California, addressed as follows:

SOLICITOR GENERAL
Department of Justice
Washington, D. C. 20530

DATED: December 14, 1970.

Anna M Gainsley

Subscribed and sworn to before me this 14th day of December, 1970.

Allen P Fields

Notary Public in and for said County and State.

ALLEN P. FIELDS
NOTARY PUBLIC — CALIFORNIA
PRINCIPAL OFFICE IN
SACRAMENTO COUNTY
My Commission Expires September 15, 1973

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. No. 25,579

FRANZO WAYNE KING,

Defendant-Appellant.

Before: MADDEN, Judge, United States Court of Claims, DUNIWAY, Circuit Judge, and SWEIGERT, District Judge

ORDER

The motion for leave to file a petition for rehearing is granted. Petition for rehearing is denied.

[FILED
Nov 16, 1970
Wm. B. Luck, Clerk]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff - Appellee,	)	
vs.	)	No. 25,579
FRANZO WAYNE KING,	)	
Defendant - Appellant.	)	
	)	

Appeal from the United States District Court for the Central District of California

Before: MADDEN,* Judge, United States Court of Claims, DUNIWAY, Circuit Judge, and SWEIGERT, ** District Judge.

PER CURIAM;

This is an appeal from the denial, by the District Court, of the defendant's motion for an order permitting the

*Honorable J. Warren Madden, Senior Judge of the United States Court of Claims, sitting by designation.

**Honorable William T. Sweigert, United States District Judge, Northern District of California, sitting by designation.

defendant to withdraw his plea of guilty, and setting aside the judgment and sentence theretofore entered against him. The motion was made pursuant to Rule 32(d) and Rule 35 of the Federal Rules of Criminal Procedure. The District Court denied the motion and filed an opinion which appears in 307 Federal Supplement at page 217. Our conclusion is that the District Court's decision was right, for the reasons stated in the Court's able opinion. We therefore affirm the denial of the defendant's motion.

Affirmed.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANZO WAYNE KING,
Defendant.

Crim. No. 36778-SD.

United States District Court
S. D. California, S. D.
Dec. 16, 1969.

Proceeding on motion to withdraw plea of guilty and set aside judgment of conviction of importation of marijuana for failing to pay occupational tax. The District Court, Russell E. Smith, J., held that fact that act of declaring marijuana and registering might subject importer to prosecution by state for possession of marijuana in that part of state between border and customs office and that importer who imported marijuana for a legal use would be furnishing evidence to be used in event he should use marijuana for purpose not licensed under state law was not sufficient to create Fifth Amendment rights and deprive United States of its right to know what crosses border or to impose conditions upon admission to United States of foreign goods.

Motion denied.

[307 F. Supp. 217 (1969)]

Harry D. Steward, U. S. Atty., Phillip W. Johnson, Asst. U. S. Atty., San Diego, Cal., for plaintiff.

Rodney A. Klein, Virga, Fields & Klein, Sacramento, Cal., for defendant.

OPINION

RUSSELL E. SMITH, District Judge.

Defendant, having pled guilty, was convicted of importing marijuana in violation of 26 U.S.C. § 4755(a) (1) without paying the occupational tax imposed by 26 U.S.C. § 4751.[1] Defendant relying on Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532, 23 L.Ed.2d 57 (1969), moves to withdraw the plea of guilty and set aside the judgment of conviction. I have heretofore denied the motion and I now file this opinion because of the importance of the question which Leary creates as to transactions occurring at our international borders. Counsel argue pro and con as to the retroactivity of the rule in Leary. If I thought that the rule of Leary applied to border transactions I would apply it retroactively, but for the reasons here stated I think Leary not applicable to any cases involving acts or failures to act at an international border.

In Leary defendant was convicted of transporting marijuana without payment of the tax required by 26 U.S.C. §4741. The case involved a transfer of marijuana, the importation of which, if it was in fact imported, was complete at the time of the violation.

In this case the defendant was convicted of a violation of 26 U.S.C. § 4755(a) (1). Whatever may be the effect of Leary upon the manufacturing, producing, compounding, dealing in, dispensing, prescribing, administering and giving away portions of § 4751, Leary can have no effect on the importing provisions of that section.

No one questions the power of the United States to regulate and tax the flow of goods across its international borders and prescribes conditions under which goods may be imported.

Any person about to enter the United States from a foreign country is required to make up his mind whether he will declare the property which he brings with him or whether he will conceal it. In the ordinary circumstance if the property declared is the kind of contraband that cannot be brought into the United States, it will be seized and destroyed. So far as federal law is concerned there has been at that time no violation. If the goods may be imported for limited purposes, it may be that in order to accomplish that importation arrangements must be made to comply with various state and federal laws. In any event the importer who declares the goods and who intends to comply with federal and state law faces no federal criminal prosecution.

In two circumstances the act of declaring marijuana and registering under 26 U.S.C. §4755(a) conceivably

could afford some proof of a violation of state law. It might be said that an importer who had not secured a state license to possess marijuana would be subject to prosecution by the state for the possession of marijuana in that part of the state (if any) between the border and the customs office. Also if the well-intentioned importer importing for a use legal under state and federal law, such as a medicinal use, later fell from grace and used the marijuana for a purpose not licensed under state law the border declaration and registration could furnish evidence that he had in fact possessed marijuana. These possibilities are not sufficient to create Fifth Amendment rights and deprive the United States of its right to know what crosses the border or to impose conditions upon the admission to the United States of foreign goods.

It is, as a practical matter, unthinkable that a state would attempt to prosecute any person for possession of marijuana if the possession were nothing more than a border station possession of declared marijuana. Indeed, in the event that marijuana is contraband and held for destruction or is detained by the United States awaiting payment of federal occupation taxes and registration and compliance with state licensing laws it may well be that the possession is in the United States. If, however, it were necessary to hold that a state law authorizing such a prosecution created Fifth Amendment rights which protected the

importer from disclosure, then it would at the same time be necessary to hold that state law invalid in that limited border situation under the doctrine of federal supremacy.

The cases of Haynes v. United States 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968), Grosso v. United States, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968), Marchetti v. United States, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968) and Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532 (1969) do not compel a contrary conclusion. None of these cases hold that every registration law which would furnish evidence in some kind of a criminal prosecution is invalid. The very careful preservation of the authority of the cases of United States v. Sullivan, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1957) and Shapiro v. United States, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948) indicates that the essentially non-criminal may be required to keep records which may at some time serve to incriminate them. Perhaps it would be sufficient to distinguish this case from the cases cited on the ground that an importer who stands at the border, having declared the possession of marijuana has, by the very declaration placed himself in an essentially non-criminal class and therefore out of the reach of the Fifth Amendment.

However, the factual situation of the defendants in all of the cited cases was different from the factual situation of the defendant here. In the Marchetti and Grosso situation a

gambler who is required to pay the tax declares his intention to engage in gambling, a widely prohibited activity. His present intention to commit unlawful acts may focus the attention of state officials upon him, and lead them to past violations. One who at the border discloses to the customs officials the possession of any kind of goods by the very disclosure evidences an intention to abide by rather than break the law.

In the Haynes situation the possessor of a firearm is required to register the firearm. Registration of the firearm which the possessor now has in hand would not in some "uncommon situations" indicate a violation of any other law. But the correlation "between the obligation to register and violations" is high. In short, the person who registers an in hand firearm has probably committed another crime of which the registration gives evidence. At the border the importer with marijuana in hand has not violated any federal law until there is a failure to disclose. Disclosures made for ordinary customs purposes or the occupational tax purposes of 26 U.S.C. §4751 do not point to any present or past violations of state or federal law.

In Leary the marijuana was in hand. Had the defendant registered and paid the tax he would have revealed the present possession of marijuana which he could not legally

possess in the state of Texas. The man at the border faces no such problem. For these reasons I believe that the doctrine of United States v. Leary, supra., does not apply in this case and that the judgment of conviction should not be set aside.

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[1]"Every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marihuana shall before engaging in any of the above-mentioned activities, and thereafter on or before July 1 of each year, pay the following special taxes respectively:"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 189, 190—September Term, 1970.

(Argued September 18, 1970 Decided October 13, 1970.)

Docket Nos. 34799, 35125

UNITED STATES OF AMERICA,

Appellee,

—v.—

STANLEY GARELLE and MARTIN ZIMMERMAN,

Appellants.

Before:

WATERMAN, MOORE, and KAUFMAN,

Circuit Judges.

Appeals from convictions and sentencing after trial before a jury for conspiracy to violate the federal marihuana laws, 21 U.S.C. §176a, in the United States District Court for the Southern District of New York, Harold R. Tyler, *Judge*. Both convictions are affirmed; as to Stanley Garelle, we remand for resentencing.

DAVID F. DEBRINS (Royall, Koegel & Wells, New York, N. Y., James M. Pape, of counsel), *for appellant Garelle.*

RONALD GENE WEBB, New York, N. Y., *for appellant Zimmerman.*

DAVID A. LEVISOHN, Asst. U. S. Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Allan A. Tuttle, Asst. U. S. Attorney, of counsel), *for appellee*.

KAUFMAN, *Circuit Judge*:

On October 23, 1968, appellants Martin Zimmerman and Stanley Garelle were charged in the first count of a three-count indictment with conspiring with seven co-defendants, five co-conspirators not indicted, and unknown others, to import, conceal, and sell a large quantity of hashish in violation of 21 U.S.C. §176a.[1] After an eight-day jury trial before Judge Harold Tyler in the Southern District of New York, both Zimmerman and Garelle were found guilty.[2] On February 20, 1970, Judge Tyler sentenced each defendant to a minimum mandatory prison term: five years for Zimmerman as a first offender; ten years for Garelle because Judge Tyler found that he had committed a second offense under the federal narcotics laws.[3] Zimmerman and Garelle appeal from their convictions. Garelle urges also that he was wrongly sentenced as a recidivist.

Viewing the government's evidence in a light most favorable to the prosecution as we are required to on this appeal, *United States* v. *Dawson*, 400 F.2d 194, 205 (2d Cir. 1968), cert. denied, 393 U.S. 1023 (1969); *United States* v. *Kahaner*, 317 F.2d 459, 467 (2d Cir. 1963), cert. denied, sub

1 The other counts charged five of the named defendants in the conspiracy count with the substantive crime of receiving, concealing, selling, etc., the hashish after it had been brought into the country.

2 The cases against the other defendants were severed.

3 Sentences were imposed pursuant to 21 U.S.C. §174:

"For a second or subsequent offense . . . the offender shall be imprisoned not less than ten or more than forty years . . ."

nom. *Corallo* v. *United States*, 375 U.S. 835 (1963), it portrayed Zimmerman as one of three manager-directors of an illicit multi national venture centered on a small Spanish island in the western Mediterranean Sea called Ibiza.

Zimmerman traveled to Ibiza from New York City in the Spring of 1966. Between that time and May of the following year, Zimmerman and two American compatriots, Robinson and Dickason, arranged at least three shipments of hashish from the island to the United States.[4] Proceeds from the last of these deliveries permitted the three friends to undertake a new, more ambitious project.

On May 19, 1967, Zimmerman, Robinson and Dickason embarked on an odyssey that took them first to London and Paris for money,[5] and then by airplane and freighter to Kathmandu, Nepal in the Himalayan Mountains. There, toward the middle of June, the trio arranged with suppliers known to Zimmerman for the purchase of some twenty-eight pounds of hashish for $300. From Nepal, the narcotics were carried by a girl named Tanya, accompanied by Dickason, to New Delhi, India. Zimmerman there had the hashish sewn into the bottom of three suitcases and completed plans for selling the drugs in Montreal, Canada.

As early as the planning stage of the trip in Ibiza, Stapley Garelle was one of two persons identified by the three adventurers as the intended buyers for the Nepal hashish. In New Delhi, Zimmerman arranged to sell half the narcotics to Garelle and half to another New York City resident, Gerald Abrams. In two conversations, one on

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4 Additionally, there was evidence that Zimmerman sent some heroin tablets from England to defendant-conspirator Gerry Abrams in early 1966.

5 A $2500 payment deposited in a Paris bank in payment for the third shipment of hashish was converted into travelers checks by Dickason; Zimmerman sold the check in London for $2200 while Dickason was reimbursed for the "lost" checks in Paris.

June 19 or 20 and the other on June 22, 1967, Garelle enlisted a friend, Arnold Cohen, to pick up Garelle's share from Dickason in Montreal. According to plan, Dickason smuggled the hashish into Montreal by plane, where, after some confusion over the meeting place, Cohen and Abrams divided the contraband between them. Disregarding Garelle's instructions to return to New York by bus to avoid the chance of a thorough border search, Cohen rented a car and stuffed the hashish under the front seat, where it was subsequently discovered by United States Customs agents as Cohen attempted to cross the border at Rouses Point, New York.

I.

Zimmerman objects to two aspects of his trial. First, he characterizes as unjustly prejudicial the government's introduction in evidence against him of two letters, purportedly written by Zimmerman. A related suggestion is that Judge Tyler should not have permitted the government's effort to attribute these letters to Zimmerman's hand by putting in evidence an exemplar of his writing along with certain other supporting documents. That the two letters were relevant to the government's case is plain. One, taken from an alleged co-conspirator, Gerald Abrams, upon his arrest, alluded to the presence of another co-conspirator (Jane Abrams) on Ibiza. This letter also corroborates testimony of co-conspirator Barry Kessler, concerning one of the alleged shipments of hashish sent prior to the trip to Nepal.[6] The second letter, seized after

6 Kessler testified to Zimmerman's allegation that Kessler was trying to "beat" him by withholding payment for hashish shipped to Kessler in 1966. They settled for about $100 of the $650 claimed by Zimmerman. The letter says: "barry K you know BEAT me—gave me $120—i expected *680* . . ."

the arrest of another alleged co-conspirator, Stuart Greenhaus, apparently prescribed the method by which Greenhaus would make payment for still another shipment of drugs (hashish and opium), this time from Rome. Both letters thus established a relationship between Zimmerman and other alleged conspirators. In addition, the first letter corroborated the testimony of a key witness. Each was well "worth consideration by the jury," 1 Wigmore, Evidence §29 at 411 (3d ed. 1940) and hence admissible, unless we can say that Judge Tyler abused his discretion in refusing to exclude them as unduly prejudicial. Although both letters do refer to sales of hard narcotics, and thus suggest criminal activity not charged in the indictment, "evidence relevant to the proof of one crime is not incompetent because it discloses the commission of another." *United States* v. *Eury*, 268 F.2d 517, 520 (2 Cir. 1959); *United States* v. *Kahaner, supra.*

To lay a foundation for the admission of the letters, the government secured an order from the trial judge directing Zimmerman to provide a sample of his writing. When Zimmerman refused to comply with the order,[7] the government introduced a letter taken from Zimmerman upon his repatriation to the United States from Beirut in January, 1966. The partial signature "Martin Zi . . . " appears at the bottom of this exemplar. The government also introduced Zimmerman's repatriation file to establish that the contents of the letter corresponded with facts about Zimmerman's recent life recorded in his file. The exemplar was clearly

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7 Zimmerman did consent to give an exemplar during the trial, just before the government called its handwriting expert to testify as to the singlehanded authorship of the letters and exemplar. On March 11, 1970, Judge Tyler sentenced Zimmerman to a five-day term to run concurrently with his sentence in the conspiracy case, for contempt of the order to produce an exemplar.

"admissible . . . to determine [the] genuineness of other handwriting attributed to . . . " Zimmerman. 28 U.S.C. §1731. See *United States* v. *Swan*, 396 F.2d 883 (2d Cir.), cert. denied, 393 U.S. 923 (1968); *United States* v. *Liguori*, 373 F.2d 304 (2d Cir. 1967).

II.

Zimmerman next contends that a delay of four months and twenty-two days, between his arrest on August 7, 1969, and his trial which began on December 29, deprived him of his Sixth Amendment right to a "speedy" trial. A review of the circumstances surrounding the faulted period, *United States* v. *Ewell*, 383 U.S. 116, 120 (1966), fails to disclose any factor favorable to Zimmerman's claim. See *United States ex rel. Solomon* v. *Mancusi*, 412 F.2d 88, 90 (2d Cir.), cert. denied, 396 U.S. 936 (1969) (relevant factors include possible waiver for failure to object, length of delay, prejudice to defendant, and reasons for delay). It is of interest that Zimmerman's counsel made no complaint of delay until December 16, when the trial was moved from its tentative starting date of December 18 to December 29, in order to accommodate co-counsel. See *United States* v. *Lustman*, 258 F.2d 475, 478 (2d Cir.), cert. denied, 358 U.S. 880 (1958). Moreover, the time between arraignment and trial here does not approach the elapsed period in any case in this jurisdiction where denial of an adequately "speedy trial" has been found. E.g., *United States* v. *Lustman, supra* (four years); cf. *Hodges* v. *United States*, 408 F.2d 543 (8th Cir. 1969) (about 18 months). Further, defendant has shown nothing to indicate that he was affected in the slightest by this short delay and we view his argument as hypertechnical and barren. There were no elements of purposefulness or oppressiveness present here,

Pollard v. *United States*, 352 U.S. 354, 361 (1957). Indeed, the "delay" was attributable solely to the length of a trial over which Judge Tyler was then presiding.[8]

III.

Garelle contests the government's introduction in evidence of an address book taken by a Bureau of Customs agent from alleged co-conspirator Robinson's luggage on August 5, 1967, during an interrogation and search of Robinson at Rouses Point. On the letter "A" page of the listed addresses, and obviously not in alphabetical order, the name and address of Garelle appears directly beneath the entry for "Jerry Abrams." Just below Garelle's address a notation reads "Ask about Mel." Mel Knee" was an alias used at times by Zimmerman.

Garelle concedes that the notebook would be admissible as circumstantial evidence of a conspiracy among those named in it, see *United States* v. *Armone*, 363 F.2d 385 (2d Cir.), cert. denied, 385 U.S. 957 (1966), but argues that its use here violated his Sixth Amendment right to confront and examine in the courtroom the witnesses against him.

We think the argument fails on several grounds. First, we perceive no justification for Garelle's construction of a portion of the government's summation as an "election" to treat the address book as "testimonial," rather than "circumstantial" proof. Garelle does not question the vitality of the rule that "when a member of a conspiracy is arrested, even after termination of the conspiracy, names and addresses found upon him or in his premises are admissible as circumstantial evidence . . ." of an agreement

8 The instant case was assigned to Judge Tyler in October pursuant to a noteworthy experimental project under which a single judge would supervise all aspects of a criminal trial, from pretrial activity to sentencing.

among the conspirators thus linked. *United States* v. *Bennett*, 409 F.2d 888, 895 n. 6 (2d Cir.), cert. denied sub nom. *Heywood* v. *United States*, 396 U.S. 852 (1969). This rule is no esoteric peculiarity of conspiracy law; it represents the common sense notion that people whose names are associated together in writing in this way are somewhat more likely for that reason to be associated also in other ways. Although the inference is usually less than compelling, more direct proof of association among conspirators is often difficult to produce in court. See Developments in the Law: Criminal Conspiracy, 72 Harv. L. Rev. 920, 981 (1959); *Nye & Nissen* v. *United States*, 168 F.2d 846, 857 (9th Cir. 1948), aff'd, 336 U.S. 613 (1949). In this case, the relevance of the notebook was enhanced by the peculiar location of Garelle's name and by the suggestive notation beneath it.

Garelle's authority for his contention that the Sixth Amendment required exclusion of this pertinent evidence illustrates by contrast the correctness of the ruling below. Thus, in *Bruton* v. *United States*, 391 U.S. 123 (1968), not a conspiracy case, a very damaging confession by one of two defendants, which inculpated the second, was improperly admitted at their joint trial. The Supreme Court held that a limiting instruction could not be depended upon to undo the grave damage to the second defendant's case.[10] The Court specifically emphasized in a footnote "that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence." *Id.* 128 n. 3. In other precedent relied on by Garelle,

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9 "In a conspiracy case, wide latitude is allowed [the government] in presenting evidence, and it is within the discretion of the trial court to admit evidence which even remotely tends to establish the conspiracy charged."

10 The Court thus overruled *Delli Paoli* v. *United States*, 352 U.S. 232 (1957).

reversals on Sixth Amendment grounds have been triggered by the admission of similar extraordinarily prejudicial hearsay evidence," whose probative worth was substantially dependent on the declarant's veracity, credibility, sincerity, and memory.[11] Since the evidentiary value of the address book bears virtually no relation to such qualities of its author or authors, the value of the testimony of the unidentified persons who put the entries in the book would be correspondingly slim.

IV.

Although we affirm Garelle's conviction, we are persuaded that he must be resentenced. At sentencing before Judge Tyler on February 20, 1970, the government filed an information charging Garelle with a previous federal narcotics conviction on January 4, 1966, in the Southern District of California. Garelle readily admitted that he had in fact pleaded guilty to a charge of "aiding and abetting the importation of 79 pounds of marihuana in violation of 26 U.S.C. sec. 4755 (a)(1)." While conceding the conviction, Garelle objected on two grounds to Judge Tyler's use of it for sentencing him as a repeater.

First, Garelle proposed the ingenious but untenable theory that the violation presently under review should be determined to have occurred at least as early as January 1, 1966. This was the date specified in Count One of the indictment as the starting date of the conspiracy. The

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11 E.g., *Douglas* v. *Alabama*, 380 U.S. 415 (1965) (prosecutor at trial of petitioner read extensively from document purported to be a confession of an alleged accomplice convicted earlier); *United States* v. *Williams*, 424 F.2d 344 (5th Cir. 1970) (key expert testimony based on complex records whose accuracy was undemonstrated).

12 Cf. *Motter* v. *United States*, 156 U.S. 237, 242-43 (1895).

"earlier" conviction on January 4, 1966, must therefore, according to Garelle, be viewed as the later. Consequently, Garelle cannot be sentenced as a second offender now.

Although we perceive that difficult questions might arise in a closer case, to dispose of the present claim it is sufficient to observe that in proving Garelle's guilt to the satisfaction of the jury the government relied on no evidence of deeds or words by any conspirator or anyone else that can be dated before January 4, 1966. Thus, the jury verdict here necessarily implies that Garelle committed every element of the crime subsequent to the California conviction. Evidence concerning the specific crime on trial is enough for one proceeding. We cannot conceive of any duty on the part of the trial court to conduct a hearing to determine if Garelle, in connection with the offense charged, also may have committed criminal acts earlier than those proven. Judge Tyler's finding that Garelle was a recidivist was inevitable.

We remand Garelle's case for resentencing, however, because we believe that *Leary* v. *United States*, 395 U.S. 6 (1969), has undermined Garelle's earlier narcotics conviction.[13] In *Leary*, the Supreme Court held that a plea of the fifth amendment privilege against self-incrimination furnished a complete defense to a prosecution for failure to secure a written order form and to pay a tax before effecting a transfer of marihuana, as required by 26 U.S.C. §§4741, 4742. Companion provisions, 26 U.S.C. §§4751, 4753, require that any person, who, *inter alia* "imports" or "deals in" marihuana must first register his "name or style

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13 Three threshold issues would warrant our discussion had they not recently been settled in this jurisdiction. In *United States* v. *Liguori*, No. 34516 (filed July 15, 1970), we held that *Leary* is retroactive, that an "assertion of the privilege [recognized in *Leary*] on collateral attack" is timely, and that a "guilty plea [does] not waive [a petitioner's] privilege against self-incrimination . . ."

and his place or places of business" with the Internal Revenue Service and pay an annual occupational tax. Gatrelle was convicted in 1965 for failure to comply with the occupational registration and tax requirements. It seems to us beyond serious dispute, and indeed the government has not argued otherwise, that Gatrelle could not have imported marihuana, registered as prescribed and paid the tax, without incurring a "real and appreciable" risk, *Marchetti* v. *United States*, 390 U.S. 39, 48 (1968), of providing both state and federal officials with incriminating evidence against himself."

Moreover, we are foreclosed from adopting the government's attempt to distinguish *Leary*. Gatrelle, it is said, as only a potential importer could have complied with the registration law and also avoided self-incrimination simply by refraining from bringing the marihuana across the Mexican border.[14] The Supreme Court rejected a substantially similar argument two years ago in *Marchetti* v. *United States*, *supra*. After *Marchetti* the rule is that the fifth amendment privilege must be taken as atemporal: the only question for us is how great would have been the danger of incrimination, regardless of whether the inculpatory evidence would point forward or backward in time. See Note, The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 199 (1968).

Since, given *Marchetti*, no facts that might emerge at a new hearing could save the 1966 conviction, neither justice

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14 For example, the importation might very well have supported a prosecution under 21 U.S.C. §176a (smuggling of marihuana). Once the marihuana was inside the country, possession would probably have been criminal in every state. See *United States* v. *Leary*, 395 U.S. 6, 17 (1969). Moreover, 26 U.S.C. §4775 requires that the IRS furnish a list of persons taxed pursuant to §4751 "upon written request, to any person." *Cf.*, e.g., *Leary*, *supra*, 395 U.S. at 16, 27.

15 *United States* v. *Krog*, 307 F. Supp. 217 (S.D. Cal. 1970).

not judicial efficiency would be served by remitting Garelle to collateral remedies, as the government urges." We remand Garelle for resentencing."

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16 *See Mercer v. United States*, 417 F.2d 488, 493 (9th Cir. 1969), cert. denied, 90 S. Ct. 898 (1970). We also reject the government's assertion that Garelle's objection to the use of the prior conviction for enhancing his sentence was "perfunctory" and "drastory" and hence inadequate. We believe that the trial judge was adequately informed of the objection and the basis for it by defense counsel's simple assertion of "an invalidity in the earlier conviction" because of *Loury*, particularly in view of a colloquy between Garelle's counsel and the court which had occurred earlier in the trial. At one point, counsel raised *Loury* as an objection to the conspiracy prosecution itself. When he offered to expand on his argument, Judge Tyler replied:

> "No. I am familiar with it. Any half way alive person, or a person who is not absolutely comatose, in this building these days is familiar with this argument specifically . . .
>
> . . . .
>
> . . . I understand you. This argument is made constantly.
>
> . . . .
>
> I don't mean to demean you or your argument. It is just that I am so familiar with it that I don't think there is any point in asking you or anybody else to take the time on it."

Record at 794-95.

17 On this appeal, Garelle has also objected to the court's ruling that the government would be permitted to impeach Garelle by introducing evidence of the prior conviction if Garelle had taken the stand; because of this, he insists, he failed to testify. However, Garelle did not then object to the proposed impeachment on the grounds of *Loury*, but as we perceive it on general grounds of prejudice. Accordingly, we cannot regard Judge Tyler's refusal to forbid the impeachment on grounds now urged for the first time (*Loury*), as "plain error." F.R. Crim. P. 52.

250—10-14-70 USCA—3863

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1112

FRANZO WAYNE KING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1966, petitioner was charged in the District Court for the Central District of California with smuggling marihuana in violation of 21 U.S.C. 176 a (two counts), importation of marihuana without payment of tax in violation of 26 U.S.C. 4755(a)(1), and smuggling merchandise in violation of 18 U.S.C. 545. Petitioner pleaded guilty to the 26 U.S.C. 4755(a)(1) count, the other three counts were dismissed, and he was sentenced to probation.

In 1969, following this Court's decision in *Leary v. United States*, 395 U.S. 6, petitioner brought the present action under Rule 32(d), F.R. Crim. P., to withdraw his plea of guilty. The district court ruled

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that *Leary* did not apply to any case, such as this one, involving acts or failures to act at an international border, because the requirements of 26 U.S.C. 4755(a)(1), as part of the overall importation-registration scheme, did not in such circumstance present real or substantial hazards of self-incrimination as to one who complied with the statutory requirements; accordingly, it denied petitioner's motion (307 F. Supp. 247; Pet. App. C). The court of appeals affirmed, relying on the opinion of the district court (Pet. App. B), and denied a motion for rehearing (Pet. App. A).

1. Marihuana which was revealed to authorities at the border would be confiscated, *prior* to its entry into the United States, unless imported for a lawful purpose, thus eliminating any possible violation of state laws prohibiting possession within the state. For this reason, the courts have uniformly rejected *Leary* challenges to convictions under 21 U.S.C. 176a—under which, for present purposes, the crime is indistinguishable from an offense under 26 U.S.C. 4755(a)(1).[1] *E.g.*, *Witt* v. *United States*, 413 F. 2d 303 (C.A. 9), certiorari denied, 396 U.S. 932; *United States* v. *Reyes-Meza DePolanco*, 422 F. 2d 1304 (C.A. 9), certiorari denied, 397 U.S. 1081; *Walden* v. *United States*, 417 F. 2d 698 (C.A. 5); *United States* v. *Houte*, 428 F. 2d 816 (C.A. 5), certiorari denied, October 26, 1970, No. 5576,

[1] The offense to which petitioner here pleaded guilty—importation of marihuana in violation of 26 U.S.C. 4755(a)(1)—also constituted a crime under 21 U.S.C. 176a, which proscribes any unlawful marihuana importation.

this Term. The court below thus correctly held, on the same ground, that petitioner's 26 U.S.C. 4755(a)(1) conviction is not constitutionally defective under the *Leary* rationale.

To be sure, the Second Circuit in *United States v. Gavelle*, No. 34739, October 13, 1970 (Pet. App. D), held that a previous 26 U.S.C. 4755(a)(1) conviction was invalid under *Leary* for the purpose of enhancing the defendant's subsequent conviction. In that case, however, the government did not advance the arguments accepted below and in the 21 U.S.C. 176a cases cited above regarding confiscation at the border. And it should also be noted that Section 4755(a)(1) is repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Public Law 91-513, 84 Stat. 1236 *et seq.*, effective in May 1971; moreover, we are advised that there have been very few convictions under this statute. In these circumstances, it is our belief that any conflict between the decision below and *Gavelle* does not warrant review by this Court.

2. Although not considered by the court below, petitioner in any event may not now challenge his plea on the basis of *Leary*, even if that decision were otherwise applicable. When petitioner pleaded guilty to the 26 U.S.C. 4755(a)(1) violation, other charges under 26 U.S.C. 176a, which carried a minimum sentence without possibility of parole, and under 18 U.S.C. 545, were dismissed. From these circumstances, it is evident that petitioner made a deliberate choice to plead guilty to the count carrying the lesser penalty in the hope

that he would receive the lesser punishment, as he did. A plea entered in such circumstances should not be deemed subject to vacation because of some subsequent change of law. See *Brady* v. *United States*, 397 U.S. 742, 757; *McMann* v. *Richardson*, 397 U.S. 759; *Parker* v. *North Carolina*, 397 U.S. 790; *Alford* v. *North Carolina*, No. 14, this Term, decided November 23, 1970.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

A guilty plea to a 26 U.S.C. 4744(a) count—the precise statute before the Court in *Leary*—in the plea-bargaining context is before this Court in *United States* v. *Liguori*, No. 993, this Term. Since, for the reasons discussed in this memorandum, *Leary* is not applicable to the statute (26 U.S.C. 4755(a)(1)) here involved, there is no occasion to delay disposition of the instant petition.

U.S. GOVERNMENT PRINTING OFFICE 1971